IN THE SUPREME COURT OF THE UNITED STATES

DONALD ABNEY
LARRY STARKS
and ALONZO ROBINSON,
Petitioners

V.

UNITED STATES OF AMERICA,
Respondent

TERM

NO. 75-6521

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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TABLE OF CITATIONS

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 5, 1976. A joint Petition on behalf of all Petitioners is filed under the authority of Rule 46 of the Rules of this Court.

OPINIONS BELOW

The oral opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, J.) in Criminal Number 74-133 is attached as Appendix "A" hereto. The Judgment Order of the United States Court of Appeals for the Third Circuit under Numbers 75-2071, 2072 and 2073 affirming the order of the District Court is attached as Appendix "B(1)" and denial of Petition For Rehearing as "B(2)". An earlier opinion of the Court of Appeals reversing judgment of conviction after direct appeal is reported at 515 F.2d 112 (3d Cir. 1975).

JURISDICTION

The judgment order of the Court of Appeals affirming the District Court was entered on February 10, 1976. A timely Petition For Rehearing was denied on March 5, 1976. On March 16, 1976, the Court of Appeals stayed the issuance of the mandate, pursuant to Rule 41(b) of the Federal Rules of Appellate

Procedure, to April 4, 1976 pending the filing of the present Petition For Writ Of Certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under the doctrine of United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975).

THE QUESTIONS PRESENTED

1. Whether retrial of Petitioners is barred by the double clause of the Fifth Amendment where a general verdict of guilty on a duplicitous indictment fails to disclose whether the jury found each defendant guilty of one crime or both.

2. Whether the indictment fails to charge an offense.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULE OF CRIMINAL PROCEDURE
7(c)(1)

(c) Nature And Contents.

> (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

STATEMENT OF THE CASE

On March 14, 1974, defendant-petitioners herein were first charged in a duplicitous one count indictment with conspiracy and attempt to violate the Hobbs Act, 18 U.S.C. § 1951; they were found guilty in a general verdict, and took a direct appeal. Judgment of conviction was reversed and the

case remanded to the district court: United States v. Starks et al, 515 F.2d 112, 115 (C.A. 3, 1975). In its opinion, this Court of Appeals found that the indictment was duplicitous. 515 F.2d at 116.

The Court of Appeals ordered the government to make an election to proceed on retrial on one or the other of the two crimes charged in the single count indictment. The government, in a pre-trial conference on August 22, 1975, expressed its intention to proceed on a conspiracy allegation of the indictment.

Defendant-petitioners each filed a Motion To Dismiss on the basis that a second trial on this indictment, even following the government's election, will subject them to double jeopardy in violation of their rights under the Fifth Amendment to the United States Constitution. In their motions, defendant-petitioners also argued that following the government's election to proceed on the conspiracy allegation, the indictment in this case is fatally defective for failure to sufficiently charge a crime under the laws of the United States.

On September 2, 1975, the District Court denied each of the defendant-petitioners' motions; this order was in turn affirmed by the Court of Appeals. Review is sought herein of this affirmance by the Court of Appeals. All proceedings concerning the retrial of petitioners in the district court have been stayed pending the filing and disposition of this Petition For Certiorari.

REASONS FOR GRANTING THE WRIT

1. Double Jeopardy Claim

The "singularly inartistic indictment" (515 F.2d 112, 116) in this case charges two offenses -- conspiracy and attempt -- in one count. (The indictment is set forth in full at Appendix "C").

The problems with a duplicitous indictment are set forth in the opinion of this Court in United States v. Starks et al, supra, at page 116:

> "One vice of duplicity is that a general verdict for a defendant on that count does not reveal whether the jury found him not guilty of one crime or not guilty of both. Conceivably this could prejudice a defendant in protecting himself against double jeopardy. Another vice of duplicity is that a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both. Conceivably, this could prejudice a defendant in sentencing and obtaining appellate review . . ." (Emphasis added). 515 F.2d 112 at 116

Professor Moore has additionally noted that the essential problem with a duplicitous indictment is the confusion it breeds in the minds of the jurors. Moore's Federal Practice, §8.03, fn. 5.

In the lower court, the Government persistently refused to elect between the charges. In his charge to the jury, the learned trial judge failed to explicitly charge that to convict any defendant of the dual charges laid in this indictment that such defendant must be found guilty by the jury of all the essential elements of both offenses. During objections

to the charge, Mr. Carroll, counsel for defendant Robinson, suggested to the Court that it had not clearly charged the jury that before any defendant could be found guilty, the jury must find:

> " . . . number 1, was there a conspiracy, number 2, was this defendant a member of that conspiracy, and, number 3, did he commit an act constituting attempt." Tr. page 10-54.
>
> The Court responded, inter alia:
>
> "If they are members of the conspiracy and one of them committed an attempt, then, as I see it under this indictment, they could all be found guilty." Tr. page 10-55.

This colloquy demonstrates the confusing nature of this duplicitous indictment. While the Court initially charged that a defendant must be found guilty of both conspiracy and attempt to be found guilty, the remainder of the charge and the express understanding of the Court was to the contrary.

Since two of the original five defendants were acquitted, the jury obviously understood that it could find some defendants guilty of less than all of the crimes charged. The key question, one which is not susceptable to an answer in the absence of pure speculation, is whether or not the jury found some of the remaining defendants guilty of less than all the crimes charged.

Given the confusing nature of the indictment and charge, the permutations of the possible bases for the verdict are indeed numerous. In light of the trial court's understanding, any of the defendant-petitioners might have been found guilty of the conspiracy without being found guilty of attempt. Moreover, any of the three defendant-petitioners might have been excluded from the conspiracy, but found guilty of attempt. The existence of this question creates a distinct possibility that a retrial of any of the three defendant-petitioners, even

on conspiracy alone, will subject him to double jeopardy:

> " . . . a general verdict of guilty does not disclose whether the jury found the defendant guilty of one crime or both . . ." Starks, 515 F.2d 112 at 116.

2. Insufficiency Of The Indictment For Failure To Charge A Crime Under The Laws Of The United States.

As discussed above, the government elected to proceed on retrial of this case on the conspiracy allegation of the indictment. Defendant-petitioners submit that the indictment, following said election, is so deficient as to require its dismissal. Specifically, following the election, the indictment must be read as a conspiracy indictment under principles of law applicable to sufficiency of conspiracy indictments, without the supportive assistance to the sufficiency of the indictment given by the allegations referring to "attempt".

The indictment does not properly charge conspiracy by its failure to allege that the defendants "did . . . conspire" together, or in any way contain charging language that demonstrates that the grand jury found an agreement among all the defendants. Stated another way, the indictment merely suggests that all the defendants "did . . . conspire", without a specific finding that each defendant had conspired with all the others. Although this contention might have appeared somewhat technical when raised before the first trial, the situation is now greatly different. At the first trial, two of the defendants were acquitted. The legal effect of such acquittal is to prevent a petit jury at the second trial from finding that any of the defendants who are standing trial a second time

guilty because they "conspired" with any of the acquitted defendants. Thus, the failure of the grand jury to find that all defendants had conspired "together" as a group makes the present indictment insufficient.

Apart from the consideration argued above, the indictment returned by the grand jury is obviously based on the theory that the defendants "attempted" to commit Hobbs Act extortion. The only allegation in the indictment which even remotely suggests conspiracy is the naked word "conspire"; no other allegations even advert to any suggestion of an agreement, which is the essential element of a conspiracy indictment. At the first trial, this issue was clouded by the duplicitous character of the indictment which allowed the government to get its case to the jury since the indictment did sufficiently charge "attempt". However, now the government has elected to proceed only on "conspiracy" and the indictment must be examined as to its sufficiency to charge this particular offense, without the benefit of the allegations dealing with "attempt", since attempt is not charged. As argued below, the government in the present indictment has, in its draftsmanship of this indictment, run afoul of basic principles of drafting conspiracy indictments.

In this regard, defendant-petitioners rely on the following cases: United States v. Britton, 108 U.S. 199 (1883); Joplin Mercantile Co. v. United States, 236 U.S. 531 (1951); Hamner v. United States, 134 F.2d 592 (5th Cir. 1943); United States v. Deutsch, 243 F.2d 435 (3d Cir. 1957); United States v. Tornaben, 222 F.2d 875 (3d Cir. 1955); United States

v. Knox Coal Company, 347 F.2d 33 (3d Cir. 1965).

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this Court should issue its Writ Of Certiorari to the Court of Appeals for the Third Circuit to review its instant decision.

Respectfully submitted,

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